2010

Grassy Meadows Sky Ranch Landowners Association v. Grassy Meadows Airport; Sky Ranch Development; and Michael O. Longley : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

GRASSY MEADOWS SKY RANCH LANDOWNERS ASSOCIATION, Plaintiff/Appellee, v. GRASSY MEADOWS AIRPORT, INC.; SKY RANCH DEVELOPMENT, INC.; and MICHAEL O. LONGLEY, Defendants/Appellants.	Case No. 20100925-CA Dist. Ct. Case No. 030501171

APPELLANT'S REPLY BRIEF

Appeal from a Final Judgment of the
Fifth Judicial District Court in and for Washington County,
The Honorable G. Rand Beacham Presiding

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For the reasons stated in its opening brief and this reply brief, Sky Ranch[1] asks this Court to reverse the trial court's rulings and remand with instructions as indicated below.

I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S RULING INVALIDATING THE 2002 DECLARATION AND INSTRUCT THE TRIAL COURT TO DECLARE THE 2002 DECLARATION VALID.

In attempting to defend the trial court's decision to declare the 2002 Declaration void *ab initio*, the Association engages in a great deal of rhetorical bluster, saying that the Declaration would turn the Development into a "bustling commercial hub with hotels, jet aircraft, hundreds of additional lots, hundreds of additional (non-resident) airstrip users and whatever other commercial development Sky Ranch 'in its sole discretion' saw fit to develop." It accuses Sky Ranch of a "power grab" and says that the 2002 Declaration made "Mr. Longley the supreme overlord of the Grassy Meadows Community." These hyperbolic statements belie not only the utterly mundane nature of the changes between the 1990 Declaration and the 2002 Declaration, but also common sense.[2] The Court should reverse the trial court's ruling on this issue and instruct it to declare the 2002 Declaration valid and enforceable. This Court should also instruct the trial court to determine an appropriate award of attorney fees as per the 2002 Declaration (Ex.6 § XII.4), including attorney fees expended on appeal.

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1. As indicated in Appellant's opening brief, "Sky Ranch" refers to Appellants collectively, and "Association" refers to the Appellee. The same method of citation to the record shall also be used as indicated in Notes 1-4 of Appellant's Opening Brief.

2. The Development is located five miles south of Hurricane, population 13,748, on a plot of land less than two square miles in area, accessible by means of a road that is only paved to the south edge of the Development, with no population between it and the south rim of the Grand Canyon, not an ideal location for a "bustling commercial hub."

A. The 1990 Declaration, when considered as a whole, unambiguously provides that Sky Ranch's right to unilaterally amend does not lapse until 120 units in the development have been sold.

The 1990 Declaration is a restrictive covenant, which is interpreted in the same way as a contract. *View Condominium Owners Ass'n v. MSICO, L.L.C.*, 2005 UT 91, ¶ 21, 127 P.3d 697. When interpreting contracts, "the cardinal rule is to give effect to the intentions of the parties, and, if possible, to glean those intentions from the contract itself." *G.G.A., Inc. v. Leventis*, 773 P.2d 841, 845 (Utah App.1989). To do this, Utah courts follow the following hierarchy of rules for contract interpretation. First, a court looks at the plain language of the contract, considering each provision "in relation to all of the others, with a view toward giving effect to all and ignoring none." *Glenn v. Reese*, 2009 UT 80, ¶ 10, 225 P.3d 185. If, after examining the language of the contract and attempting to harmonize its provisions, the court finds that "it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies," the court will consider "extrinsic evidence of the parties' intent." *Id.* "It is only after extrinsic evidence is considered and the court is still uncertain as to the intentions of the parties that ambiguities should be construed against the drafter." *Wilburn v. Interstate Electric*, 748 P.2d 582, 585-86 (Utah App. 1988).

In its opening brief, Sky Ranch explained how, even if the provision of the 1990 Declaration that allows unilateral amendment until "80% of the lots in the community (including additional phases as may be added) have been sold to purchasers" may be ambiguous in isolation, the other provisions of the 1990 Declaration make it clear that the intent of that provision was to allow Sky Ranch to unilaterally amend until 80% of the maximum number of lots allowed in the 1990 Declaration were sold. The Association

ignores the requirement to harmonize the document and to consider extrinsic evidence. Instead, it skips straight to the conclusion that any language that may be ambiguous in isolation must be construed against the drafter. This approach is contrary to Utah law and must be rejected.

The Association argues that the trial court's interpretation of the 80% provision does not need to be better, it just needs to be reasonable in order to conclude that the provision is ambiguous. The Association is, in effect, arguing that even though one interpretation of a provision is substantially more consistent with the rest of the contract than another, the provision should still be found to be ambiguous if the other interpretation meets some threshold of plausibility. The Association provides no authority for this interpretation, nor does it explain what the threshold for plausibility is. Courts tend to look at plausibility in comparison to other alternatives, not against a baseline of plausibility. *See, e.g., Moss v. Parr Waddoups Brown Gee & Loveless*, 2008 UT App 405, ¶ 14, 197 P.3d 659 ("In this case, the parties competing interpretations are not equally plausible and reasonable . . . ."); *Nelson v. Betit*, 937 P.2d 1298, 1304 (Utah App. 1997) ("Because the statute's plain language is susceptible to two equally plausible interpretations, we do not find the statutory language to be as 'clear' as each party argues."). Moreover, viewing each alternative interpretation in isolation rather than comparing them with each other defeats the purpose of contract interpretation: rather than determining the intent of the parties based on the contractual language, it treats every interpretation that has some support as equally valid, obscuring intent and creating ambiguity where none exists. This would cripple legal doctrines such as the four corners rule and the parol evidence rule, and this Court should decline to enact such a far-

reaching change on Utah law. Finally, "to be ambiguous, both interpretations must be plausible in the context of the contract as a whole." *Merick Young Inc. v. Wal-Mart Real Estate Business Trust*, 2011 UT App 164, ¶ 18, 257 P.3d 1031. Therefore, by showing that the trial court's interpretation would conflict with other provisions in the 1990 Declaration and would go against the purpose of the document, Sky Ranch has shown that the trial court's interpretation is not plausible.

Next, the Association argues that because the provision at issue contains the phrase "Notwithstanding anything herein contained to the contrary," the Court should not attempt to harmonize the provision with the rest of the 1990 Declaration. In its context, this phrase refers not to other sections of the document, but the other provisions for amendment contained within that section. To accept the Association's alternate interpretation, the Court would have to conclude that by invoking this phrase, the parties intended to have the provisions of the contract conflict. That simply is not a plausible reading of this phrase.

The Association then argues that Sky Ranch's clarification of the 80% provision in the 2005 Declaration was an admission by Sky Ranch that the language in the 1990 Declaration was ambiguous. However, whether ambiguity exists is a question of law for the Court to decide; whether a party believes language is ambiguous is irrelevant. *Saleh v. Farmers Ins. Exchange*, 2006 UT 20, ¶ 14, 133 P.3d 428. Clarifying the language in the 2005 Declaration was done in response to a dispute about the interpretation of that provision. (*See* Ex.38.) However, just because parties have a dispute about the interpretation of language does not mean that the language is ambiguous. *Saleh*, 2006 UT 20 at ¶ 21. Just as a subsequent remedial measure is not competent evidence of

negligence, *see* Utah R. Evid. 407, clarifying language in a subsequent draft does not mean that the prior language was ambiguous.

Finally, even if this Court finds that the provision is ambiguous, the proper step would be to remand to the trial court for further findings, as the provision cannot be construed against the drafter until the trial court examines the extrinsic evidence and finds that it does not resolve the ambiguity. The trial court did not do this, and so its ruling must be reversed.

B. The amendments contained in the 2002 Declaration were reasonable and within the scope of Sky Ranch's power to amend.

In arguing against the validity of the challenged portions of the 2002 Declaration, the Association reads the comparable provisions of the 1990 Declaration as narrowly as possible, while reading the challenged provisions as broadly as possible. This is improper. In resolving a facial challenge[3] to the validity of amendments to a declaration of restrictive covenants, the reviewing court applies a presumption of validity and, to the extent that the language allows, interprets provisions in a manner consistent with the drafter's power to amend. *See Stengl v. Todd*, 554 P.2d 1316, 1319-20 (Utah 1976) ("a construction giving an instrument a legal effect to accomplish its purpose will be adopted where reasonable, and between two possible constructions that will be adopted which

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3. As is made clear in both its Amended Complaint (R. at 211/15-16) and its Trial Brief (R. at 727/5-10), the Association is not challenging whether these provisions are valid as applied to a certain project or activity. Rather, the Association requests that the 2002 Declaration be declared void *ab initio*. In order to make such a challenge, the challenged provisions must be invalid in all of their applications. *Cf. State v. Gallegos*, 2009 UT 42, ¶ 14, 220 P.3d 136 (explaining the difference between a facial and as-applied challenge to the constitutionality of a statute); *Lummi Indian Nation v. State*, 241 P.3d 1220, 1227 (Wash. 2010) (noting that an as-applied challenge does not render a statute completely inoperative, in contrast to a facial challenge).

establishes a valid contract."); *Emerald Estates Community Assn, Inc. v. Gorodetzer*, 819 So.2d 190, 193 (Fla. App. 2002) ("Restrictions found within a Declaration are afforded a strong presumption of validity."); *cf. I.M.L. v. State*, 2002 UT 110, ¶ 25, 61 P.3d 1038 ("we afford statutes a strong presumption of constitutionality, and will, whenever possible, construe a statute so as to save it from constitutional infirmities."). In determining the validity of the provisions, the reviewing court should not render advisory opinions or settle "the hypothetical application of a [provision] to a situation in which the parties might, at some future time, find themselves," but should stay within the limits of settling "actual or imminent clashes of legal rights and obligations between the parties." *See Redwood Gym v. Salt Lake County Comm'n,* 624 P.2d 1138, 1148 (Utah 1981).

If the reviewing court determines that it cannot read the challenged provisions in such a way as to sustain their validity, then the next step is determine whether the challenged provisions (or language within those provisions)[4] are severable from the remainder of the declaration. *See Viking Properties, Inc. v. Holm*, 118 P.3d 322, 326-28 (Wash. 2005).[5] A provision, term, or phrase is severable if it can be removed (1) while leaving the remainder of the declaration grammatically intact, and (2) without affecting the purpose, intent and operation of the declaration. *Cf.* 16A Am. Jur. 2d *Constitutional Law* § 200 (2011) (Note 7 and surrounding text). Only if the reviewing court determines

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[4] The reviewing court should sever as narrowly as possible, and need not strike an entire provision if striking only a certain term or phrase will render the provision valid. *See Vales v. Kings Hill Condominium Ass'n*, 125 P.3d 381, 388-89 (Ariz. App. 2005) (striking out a date from a provision to make a provision of a restrictive covenant valid); *cf.* 16A Am. Jur. 2d *Constitutional Law* §199 (2011) ("[A] court should refrain from invalidating more of a statute than is necessary.").

5. Contrary to the Association's claim, the issue of severability was raised before the trial court (R. at 733/16-17).

that one or more of the challenged provisions cannot be harmonized and cannot be severed will the court strike down the entire declaration.

The trial court did not follow these rules in determining the validity of the 2002 Declaration, and neither the trial court nor the Association has made it clear exactly which sections of the 2002 Declaration are at issue, making it difficult to go through the steps of construal and severance. However, for the benefit of this Court, Sky Ranch will review what it believes are the challenged provisions in the 2002 Declaration.[6]

1. Commercial Development.[7] As explained in pages 21-23 of Sky Ranch's Opening Brief, the amendments relating to commercial operations were reasonable clarifications and adjustments that did not substantially expand Sky Ranch's right of commercial development from the 1990 Declaration as amended[8] and other agreements.[9]

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6. As the Association does not attempt to defend the trial court's conclusion that the taxiway maintenance provisions (Ex.6 §§ I.23 & IV.1) were impermissible, Sky Ranch will not further address this subject in this brief.

7. *See* Ex.6 §§ I.5 (defines "commercial"), I.13 (defines "FBO"), VII.6 (reserves right of Declarant to engage in commercial activity on non-residential lots), VII.8 (provides that quiet enjoyment rights do not limit right to commercial development), VII.16 (reserves right of Declarant to engage in commercial activity).

8. Comparing the provisions *supra* in Note 7 with Ex.5 §§ VII.6, VII.16 and Ex.36 § 9, Sky Ranch found the following changes: "Gas sales for both automobiles and aircraft," "lodging units," and "a convenience store" were added to possible commercial activities ("restaurant," "aircraft washing facility" and "aircraft repair" are listed in Ex.36 § 9); § VII.6 was amended to add language allowing Declarant to conduct commercial operations "in other locations in the development," as contemplated by Ex.36 § 9 and other provisions; § VII.6 was amended to state that commercial operations shall not unreasonably interfere or restrict the Owners' beneficial use and enjoyment of their property "in the view of the Declarant"; § VII.8 was amended to provide that quiet enjoyment rights could not be used to restrict Declarant's commercial operations; and § VII.16 was amended to state that Declarant's right to conduct commercial activity was not "subject to any time limit." While Sky Ranch believes that these are permissible amendments, all of this language is easily severable.

In order to argue otherwise, the Association reads the 1990 Declaration as narrowly as possible and the 2002 Declaration as broadly as possible. This is improper. As explained above, the 2002 Declaration cannot be declared facially invalid based on speculation about how the provisions might be abused in the future. Instead, it must be found invalid in all of its applications. The Association does not show this.

Moreover, while the Association asserts that the 2002 Declaration "eviscerates all other limitations that previously existed on Sky Ranch's power to engage in commercial development," it provides no warrant for this claim. Specifically, the Association does not explain the material difference between Sky Ranch being allowed to conduct "such other business operations as it may deem necessary and appropriate," (Ex.5 § VII.6), and Sky Ranch being allowed to develop "any other related facilities deemed appropriate or desirable by the Declarant." (Ex.6 § I.13.)[10] In fact, to the extent that either clause provides an enforceable limit on the type or scope of commercial development,[11] the 2002 Declaration appears to put more restrictions on Sky Ranch, as it refers to "related facilities." Likewise, the Association's assertion that the 2002 Declaration "drops the

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9. While the Association states that it contested Mr. Longley's testimony that an FBO agreement existed (as explained on page 22 of Sky Ranch's opening brief), it does not cite any record evidence that would have refuted Mr. Longley's testimony. While the particular draft agreement was not admitted, Mr. Longley's unrefuted testimony was sufficient to establish that an agreement existed.

10. As the phrase "necessary and appropriate" remains in the amended version of § VII.6 (*see* Ex.6 § VII.6), it is unlikely that a different wording in the definitions section amounts to a material change.

11. Both Declarations expressly state that commercial development is not limited to the examples given. (*See* Ex.5 § VII.6 (providing that commercial development allowed "includ[es], but [is] not limited to" the listed purposes); Ex.6 § I.13 (providing that the FBO "may include, but is not limited to" the listed purposes).)

limitation to keep business development consistent with the Association members' beneficial use and enjoyment of their property" is without foundation in the text, as discussed in pages 22-23 and footnote 13 of Sky Ranch's Opening Brief. Finally, the Association's argument that the 2002 Declaration allows commercial development in any way Sky Ranch "in its sole discretion deems to be appropriate" reads the language out of context. The language the Association refers to is found in the property description portion of the Declaration (Ex.6 § II), and refers to the scope of Sky Ranch's easements and rights of way. This provision keeps the Association from restricting the right of way to the commercial development, does not expand the scope of commercial development, and is substantially similar to the language of the 1990 Declaration. (*See* Ex.5 § II.)

2. Expansion and Annexation.[12] Contrary to the Association's assertion, the 1990 Declaration did not restrict expansion to a "small part of section 28." The 1990 Declaration stated that the "Property" included the land described in Exhibits A and B (Phases I and II, respectively) and "such portions of additional land which may be annexed to the Development as provided herein." (Ex.5 § I.3; *see also* Ex.5 §§ XI.1 & XI.2(d).) In fact, the phases in the supplementary declarations, recorded before the 2002 Declaration, already went outside of Section 28. (*See* Ex.6 § I.20 (showing dates that phases were recorded); Ex.10-13 (showing that Phase 3 is in both Sections 28 and 33, and that Phases 4, 5A and 5C are entirely in Section 33).) In fact, to the extent that it restricts the land that can be annexed to Sections 28 and 33, the 2002 Declaration actually restricts the rights of Sky Ranch far more than the 1990 Declaration. Finally, there is no record evidence to show how much property could be further annexed into the Community in

12. *See* Ex.6 §§ I.12 (defines "expandable land"), I.21 (defines "property").

Sections 28 and 33. Without this evidence, neither the trial court nor this Court can determine how further annexation could fundamentally alter the character of the community.

3. Hangar and Commercial Lots.[13] Next, the Association complains that the provisions allowing owners of hangar lots to use the airstrip "allows potentially hundreds of additional people who do not even live at Grassy Meadows to use the airstrip" and "transforms what was supposed to be a private airstrip . . . into the equivalent of a general aviation airport open to hundreds of additional users." The Association also argues that by expanding the definition of lots to include hangar lots and allowing further commercial lots, Sky Ranch instituted an "altered voting scheme" that would "ensure[] that Sky Ranch will always be able to at least outvote the residents of the Community, even after its Class B status eventually terminates." These concerns are misplaced.

As explained in Page 21 of Sky Ranch's Opening Brief, the provisions for hangar lots (and their voting rights) were already in the 1990 Declaration as amended by the Phase 5C Declaration, which is not at issue. (*See* Ex.36 §§ 3 & 5.) Indeed, while the Association alleges that Sky Ranch's observation that it had 203 *votes*[14] to the other members' 77 votes at the time of the 2002 Declaration (*see* Ex.6 § III.2(a)) was solely based on the lots that had been dedicated through Phase 5C. Essentially, they are challenging the wrong declaration. The Association attempts to respond by stating that

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13. *See* Ex.6 §§ I.16 (defines "lot"), I.17 (defines "member"), I.19 (defines "owner"), III.2 (sets forth the voting rights of owners of hangar lots and commercial lots), XI.1 (allows for annexation for additional "residential, hangar, or commercial lots"); XI.2 (provides that "there is no restriction regarding the number of hangar and commercial units allowed").

14. Not *lots*, as the Association suggests.

"the 5C Declaration defined only the rights of hangar owners in 5C, not the owners of hangars located elsewhere in the development, including the vast land expansion." As explained above, there is no evidence of a "vast land expansion," and no evidence of "hundreds of additional [hangar lot owners]" beyond Phase 5C. The Association is arguing against a speculative injury without providing any evidence of its likelihood of occurring. Furthermore, as explained above, there was nothing in the 1990 Declaration that would have limited this "vast land expansion." The same goes for commercial lots. The Association has not provided evidence of a vast expansion of commercial units, and so its complaints are speculative. Further, the 1990 Declaration specifically stated that the Declarant intended to develop further commercial lots. (*See* Ex.5 § VII.6.) Allowing further hangar and commercial lots is consistent with the provisions 1990 Declaration as amended[15] and would not fundamentally alter the character of the Community.

4. Class B Voting Rights.[16] The Association next argues that the 2002 Declaration impermissibly "resurrected" Class B voting rights. This is adequately addressed in pages 24-25 of Sky Ranch's opening brief, and was not responded to in the Association's brief.[17]

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15. *See* Ex.5 § XI.5 (providing that the 1990 Declaration includes all supplements).

16. *See* Ex.6 §§ III.2 (setting forth Class B voting rights, including voting rights for hangar units owned by or held in trust for Sky Ranch), III.5 (providing for reinstatement of Class B voting rights upon further expansion).

17. The Association's brief seems to imply that Sky Ranch surrendered its Class B rights by signing the Association Bylaws. This is not supported by the evidence they point to, as the document referred to was never entered into evidence and so cannot be reviewed by this Court. Also, Mr. Longley makes clear in his testimony that he signed the document under duress. (Tr.1 135:20-22.)

5. Automatic Dismissal Clauses. The Association next argues that the automatic dismissal clauses are impermissible amendments. These automatic dismissal clauses can be divided into two categories: first, those that call for dismissal of a member of the Board of Trustees for failing to recognize voting rights,[18] and second, those that call for dismissal of a member of the Board of Trustees for failing to properly perform his or her duties.[19] With respect to the first category, the Association's argument that these clauses are "designed to chill a party's right to challenge illegal provisions [in the declaration]" is incorrect. These clauses do not preclude contesting the voting provisions by seeking a declaratory judgment or other legal action; they only prohibit the board from adjudicating that issue on its own and requiring the Declarant or Class C member to seek an injunction to enforce its rights. Therefore, while the Association is correct in that these clauses are not the same as a will contest clause, that is only because, unlike in a will contest clause, these clauses allow for a legal challenge without losing status. These clauses are designed to better ensure the workability of the voting scheme and are therefore legitimate.

With respect to the second category, all of these clauses seek to provide a way for a member of the Association, short of obtaining an injunction, to enforce the provisions

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18. *See* Ex.6 § III.2 (providing that "it shall be cause for automatic dismissal from membership on the Board of Trustees" to "fail to recognize Declarant's class B votes, including those held in trust for Declarant," or "to fail to recognize the votes of any Class C member."

19. *See* Ex.6 §§ V.2 (providing that "it shall be cause for automatic dismissal" to spend assessments for purposes outside of those enumerated, including payment "to any attorney or law firm to pursue any claim, assert any point of view or fund any lawsuit" other than collection actions, without the consent of two-thirds of the Members), VI.2 (providing for automatic dismissal for failure to maintain the common areas and taxiways), VI.5 (providing for automatic dismissal for failure to maintain the airstrip, failure to pay the rental payments on the airstrip, or failing to sign the addendum to the lease agreement to connect the airstrip to Phases 4, 5a, 5b, and 5c of the Development).

of the Declaration. The Association does not argue that the underlying provisions are reasonable and within the scope of the 1990 Declaration. An enforcement mechanism, therefore, would simply be a way to "better insure . . . workability of the arrangement which is contemplated by the Declaration," and so the clauses are legitimate.

6. Fee Provision.[20] Contrary to the Association's claims, this provision does not give Sky Ranch the ability to charge a fee for use of the airstrip. As stated in the opening brief, this language was vague, as it is not clear whether the Declarant's ability to charge fees is intended to apply to just the recreational facilities, or to the airstrip as well. Given that Association members have the right to use the airstrip under the Airport Lease (*see* Ex.1 § 1), and the Declarant is not the Airport Owner and has no interest in the airstrip, it is not reasonable to read this provision as authorizing Sky Ranch to levy a fee for use of the airstrip. As there is no evidence that Sky Ranch has attempted to charge Association members for the use of the airstrip, any injury would be speculative.

7. Jets and Large Aircraft.[21] This is adequately addressed in pages 26-27 of Sky Ranch's opening brief. The provisions are subject to the Federal Aviation Regulations, and are entirely severable at any rate.

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20. *See* Ex.6 § IV.4(d) (providing that a member's right to enjoy the common areas is subject to "the right of the Declarant or association to charge reasonable admission and other fees of Association members for use of the airstrip or any recreational facilities situated upon the common area.")

21. *See* Ex.6 §§ IV.2 (providing that the right to enjoy the common areas does not preclude "jet or large aircraft operated by invitees from using the airstrip"); IV.4(e) (same); IV.4(k) (same); VII.8 (providing that the right to quiet enjoyment "shall not restrict the use of the airstrip by jet or large aircraft"); VII.22 (waiving a member's claim "against use of the airstrip by aircraft, including jet and large aircraft").

8. Restriction of Rulemaking Authority. Finally, the Association objects to two of the restrictions placed on its rulemaking authority in the 2002 Declaration. (*See* Ex.6 § XII.2.) First, it complains that the 2002 Declaration "makes it so any rule Sky Ranch adopts regarding the airstrip will trump any inconsistent rule adopted by the Association in perpetuity." It is true that the Airport Owner's rules regarding the airstrip will trump inconsistent Association rules, and this makes sense, as the Airport Owner is the landlord and the Association is the tenant. This power would not extend beyond the use of the airstrip, however.

Second, the Association complains that the 2002 Delcaration gives Sky Ranch the right to veto Association rules until both (1) 15 years has elapsed from the date of recording, and (2) Declarant's Class B voting rights had lapsed. (*See* Ex.6 § XII.2.) However, this is another reasonable amendment. As the Association itself pointed out, the 1990 Declaration provided that the Declarant had to approve all amendments while its Class B voting rights were extent. (Ex.5 § XII.3.) As the rulemaking authority of the Association is merely an extension and elaboration of its powers under the Declaration, this provision is not a substantive shift of power between the Association and the Declarant; it just codifies a different procedure for exercising that power. The only part of this provision that may be questionable is the possibility of extending the provision beyond the time when Declarant's Class B voting rights lapse. However, even if this Court found that retaining the right beyond that time would be unacceptable, the Court can merely strike out the words "During the 15 year period following the date on which this Second Restated, Supplementary Amended Declaration is filed for the record in the

Office of the County Recorder of Washington County, Utah, or" and "whichever is longer," leaving the provision grammatically and functionally sound.

II. THIS COURT SHOULD REVERSE THE TRIAL COURT'S SUMMARY DECISION ON SKY RANCH'S CLAIMS FOR BREACH OF THE FBO AGREEMENT AND TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS, AND INSTRUCT THE TRIAL COURT TO TAKE EVIDENCE ON THE ISSUE.

Because the trial court had earlier agreed to allow Sky Ranch to produce evidence on the issue at a later date, the trial court's decision to summarily decide the issue of whether the Association was liable for damages for opposing the FBO before the Washington County Planning Commission was a violation of Sky Ranch's right to due process. In its brief, the Association appears to concede that the trial court's determination that the Association had no contractual obligation not to oppose [Sky Ranch's] effort to change the zoning ordinances applicable to the Airport and community" (R. at 741/21) is in error, and defends the trial court's decision based only on the argument that "the Association could not be liable for tortious interference as a matter of law." However, the Association fails to address the fact that the *Noerr-Pennington* doctrine does not apply, as it waived its right of petition by contract.

First, however, the Association attempts to discount the impropriety of the trial court's decision, but to no avail. The Association argues that the trial court only agreed to give Sky Ranch more time to produce evidence "if necessary." This is a misrepresentation of the trial court's statement. In the statement that the Association refers to, the trial court acknowledges that there was no time to present Sky Ranch's case for tortious interference and asks counsel how they should proceed. (Tr.2 170:6-15.) After Sky Ranch's counsel indicates that he would rather come back and submit evidence

on the tortious interference issue rather than attempt to present evidence that day (Tr.2 170:18-171:9), the conversation on the record is as follows:

> THE COURT: Okay. Then do you want me to try to work up some—of course, starting with your proposed findings of fact and conclusions of law, do you want me to do those on the part of the trial I've heard, or do you want to reserve all of that and have one set of findings and conclusions?
>
> MR. SMITH: I was going to say go forward.
>
> MR. HOOLE: I think based on evidence that's come in, I would probably request submit a revised version. But I think I need to conform some of those findings that I would propose to the Court based upon the evidence that's actually been admitted so.
>
> THE COURT: And then do that and then later try, if necessary, the issue of damages and tortious interference?
>
> MR. SMITH: Tortious interference I think is in play no matter what we do.
>
> THE COURT: Right.

(Tr.2 171:10-172:1.) As is obvious from the transcript, the trial court acknowledged that it would take evidence on the issue of tortious interference at a later date, not just "if necessary," as the Association claims.

The Association also argues that there was argument from both parties regarding the issue of tortious interference in their closing arguments. However, as shown earlier, the trial court had previously agreed to take further evidence on the issue. In response to the Association's unilaterally raising this issue in its closing (Tr.2 182:13-183:18), Sky Ranch responded that the issue was "premature because we haven't had a chance to put our evidence on about tortious interference." (Tr.2 205:14-16.) Sky Ranch simply did not have proper notice or the opportunity to make a considered response with the benefit of evidence and legal argument, and the trial court's ruling on this issue was therefore improper.

More importantly, the trial court's decision was incorrect as a matter of law, as there was evidence presented at trial that the Association had a contractual obligation not to interfere with development of the FBO area. While the Association argues that it is immunized from liability for its breach of this obligation under the First Amendment, it does not address the fact that it is well-established law that First Amendment rights can be waived or bargained away by contract.[22]

Rather than attempt to shoehorn the *Noerr-Pennington* doctrine onto contract law, the Association tries to avoid the issue altogether by arguing that "[i]nstead of suing the Association for breaching this alleged agreement . . . , Sky Ranch sued the Association for tortious interference of contract," concluding that this is fatal to Sky Ranch's claim. The Association's argument is without basis in fact or law. First, even a cursory glance at the pleadings shows that Sky Ranch's counterclaim asserts causes of action for "Tortious Interference with Business Relations" and "Breach of Contract—FBO Agreement." (R. at 489/12-16.)[23] Second, even if Sky Ranch had misidentified the legal theory under which

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22. In addition to the authority cited for this proposition in Point II.B of Appellant's opening brief, *see also Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (finding valid waiver of First Amendment rights in labor agreement); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094-97 (3d Cir. 1988) (finding valid contractual waiver of First Amendment rights); *ITT Telecom Prods. Corp. v. Dooley*, 262 Cal. Rptr. 773, 780 (Cal. App. 1989) (explaining that "it is possible to waive even First Amendment free speech rights by contract"); *In re Steinberg*, 195 Cal. Rptr. 613, 616-18 (Cal. App. 1983) (finding waiver of First Amendment rights by filmmaker); *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-71 (1991) (holding that, notwithstanding First Amendment concerns, a promise of non-disclosure could be enforced under a theory of promissory estoppel).

23. As recognized by the Utah Supreme Court in *Leigh Furniture v. Isom*, "a breach of contract committed for the immediate purpose of injuring the other contracting party" gives rise to a cause of action for tortious interference with business relations. 657 P.2d 293, 309 (Utah 1982).

it was entitled to relief, this would not be a fatal flaw, as Utah law requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to state a cause of action, Utah R. Civ. P. 8(a)(1), and that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," Utah R. Civ. P. 54(c)(1).[24] Rule 54(c)(1) highlights the reason why the trial court's decision to grant judgment based only on the closing arguments was in error: without allowing Sky Ranch the opportunity to either present its facts at trial or to provide the trial court with considered points and authorities supporting its legal theories, Utah's policy in favor of liberal pleading and resolving disputes on their merits would be frustrated. This Court should reverse the trial court's judgment and instruct the trial court to take evidence on this issue.

III. THIS COURT SHOULD REVERSE THE TRIAL COURT'S RULING THAT SKY RANCH WAS NOT ENTITLED TO TERMINATE THE LEASE AND INSTRUCT THE TRIAL COURT TO DECLARE THE LEASE TERMINATED AND TO DETERMINE DAMAGES.

As stated in Sky Ranch's Opening Brief, the trial court erred in finding that the Association was not in material breach of the lease and that Sky Ranch was precluded from terminating the lease for failure to give proper notice. Rather than providing this Court with any helpful argument or analysis, and rather than responding to the points made in Sky Ranch's Opening Brief, the Association repeats the findings and conclusions

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24. *See also Cowley v. Porter*, 2005 UT App 518, ¶ 38, 127 P.3d 1224 ("Rule 54(c)(1) requires trial courts to be liberal in awarding appropriate relief justified by the facts developed at trial, as long as the failure to request a particular form of relief does not prejudice a party in the preparation or trial of the case."); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24-25 (4th Cir. 1963) (holding that the federal equivalent of the rule ensures that "a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights.").

of the trial court without analysis, including a five-page stretch of its brief where it copied and pasted the trial court's findings. Therefore, rather than rehash its arguments, Sky Ranch will refer the Court to the following pages of its Opening Brief: pages 46-47 explain that the trial court improperly raised the issue of delivering notice *sua sponte* and that the content of the notice, along with prior communications, was adequate to inform the Association of the breaches that needed to be cured. Pages 33-46 marshal the evidence underlying the trial court's findings that the Association had substantially complied with the lease, and point out the fatal flaw in the trial court's reasoning.[25]

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25. Contrary to the Association's accusation, Sky Ranch properly marshaled the evidence in support of the trial court's findings. First, it is important to note that the marshaling burden is intended to be directed to the general or ultimate findings of the trial court, rather than the subsidiary findings. *See Parduhn v. Bennett*, 2005 UT 22, ¶¶ 24-25, 112 P.3d 495. Sky Ranch challenged the trial court's findings that (1) the runway was properly maintained, (2) the lighting system was properly maintained, (3) the weeds, fences, and general maintenance of the airport was properly maintained, and (4) the insurance provisions of the lease were substantially complied with. Sky Ranch treated subsidiary findings by the trial court as evidence in favor of those ultimate findings (except where Sky Ranch challenged the accuracy of the subsidiary finding), and provided further evidence not mentioned by the trial court where applicable. This satisfies Sky Ranch's burden "to correlate particular items of evidence with the challenged findings and convince [the appeals court] of the [lower] court's missteps in application of the evidence to its findings." *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

In fact, the Association's accusation that Sky Ranch failed to marshal is ironic, given its failure to properly fulfill its own burdens under the Utah Rules of Appellate Procedure. First, the Statement of the Case and Statement of Facts in its brief are nearly devoid of citations to the record as required by Utah R. App. P. 24(e). Second, while the Association mentions "a number of affidavits and deposition transcripts" and "other record evidence not cited by the trial court," it does not give a citation to this evidence nor explain the content of this evidence. In order to prove its accusation that Sky Ranch failed to marshal, all the Association has to do is cite "a scintilla of evidence supporting the district court's ruling." *Parduhn*, 2005 UT 22 at ¶ 25. By not fulfilling even this nominal burden, the Association shows that it, not Sky Ranch, is the party seeking to

Finally, pages 47-48 explain why Sky Ranch was not equitably estopped from terminating the lease (a point which the Association appears to have conceded).

While not dispositive of the issues, there are four points that were made in the Association's brief that merit a response. First, the Association claims that it had no responsibility to overlay or resurface the airstrip. The Airport Lease states that "Lessee may make improvements to the common areas, such as resurfacing the runway, or as the need or purpose of the Lesee arises, upon approval of the Lessor, which approval shall not be unreasonably withheld." (Ex.1 § 6.) While the Association claims that the word "may" indicates that they had no responsibility to resurface the runway, this is not a tenable interpretation given the nature and purpose of the lease. First, the lease was for 99 years. (Ex.1 at 2.) However, asphalt has a lifespan of only 20 years. (Tr.2 72:4.) Therefore, in order for the airstrip to remain a functional and valuable asset, one of the parties had the responsibility to resurface the airstrip. The lease makes very clear that the lease was "as-is" (Ex.1 § 1) and a "triple-net lease with no costs payable by the Lessor." (Ex.1 § 8.) *See Holladay Towne Center, L.L.C. v. Brown Family Holdings, L.L.C.*, 2011 UT 9, ¶¶ 40-42, 248 P.3d 452 (holding that a triple-net provision allocates all expenses relating to the property to the lessee). Without any specific provision showing that the Lessor was responsible for resurfacing, that burden is allocated to the Lessee. Therefore, the section of the Airport Lease referred to by the Association must be read to refer to resurfacing that substantially improves the airstrip from its original state at the beginning of the lease period, not resurfacing that is required to keep the airstrip in working order.

"dump the burden of argument and research" on this Court. *State v. Larsen*, 828 P.2d 487, 491 (Utah App. 1992).

Second, the Association claims that Sky Ranch did not prove that it was damaged. This is simply false. As shown in Sky Ranch's Opening Brief, the Association was allowing economic waste on the premises. The very example that the Association uses in its brief—Mr. Longley's testimony that he spent about $12,000 on cleaning up weeds and oiling fences—is sufficient to prove the fact of damage. As the issue of the amount of damages was reserved for another proceeding (Tr.1 21:3-17), it is understandable that there was not a great deal of evidence submitted on that subject, and in fact, to the extent that the question of how substantially Sky Ranch was damaged comes into play in determining substantial compliance, it was inappropriate of the trial judge to make the finding without hearing testimony on damages.

Third, the Association argues that as there were no further allegations of breaches in the record after the termination of the lease, this somehow proves that the breaches were insubstantial. This is a misreading of the fourth factor in determining substantial compliance, which asks whether breaches were cured within a reasonable timeframe. As the breaches in this lease were subject to notice and time to cure, the factor does not apply. Further, the Association's point is nonsensical—first, there cannot be a breach of a lease that is already terminated, as this one was, and second, any other complaints about what happened after the date of termination would not be relevant to the proceedings before the trial court.

Finally, the Association claims that it would suffer disproportionately from the termination of the lease. This does not take into account the fact that Sky Ranch does not have anyone else to lease the land to. There may be renegotiations, and the parties would likely enter into a different agreement than the one before, but as Sky Ranch's trial

counsel said, Sky Ranch "can't pick up the runway and take it somewhere else." (Tr.2 205:3-4.) While termination was not an ideal remedy for Sky Ranch, it is the only remedy that was afforded to it by the Airport Lease for the Association committing waste on the property.

IV. THIS COURT SHOULD REVERSE THE TRIAL COURT'S RULING THAT THE FUNDS HELD IN ESCROW CONSTITUTED FULL PAYMENT OF THE AIRPORT LEASE THROUGH DECEMBER 31, 2010 AND INSTRUCT THE TRIAL COURT TO TAKE EVIDENCE ON THE ISSUE.

In its Opening Brief, Sky Ranch argued that the trial court's ruling that the funds held in escrow by the trial court constituted full payment for the Airport Lease through December 31, 2010 was in error, as the issue was not properly before the trial court. The Association has two responses to Sky Ranch's argument: first, it says that the issue was presented to the trial court, relying on one sentence in an exhibit to Sky Ranch's counterclaim. Second, it claims that the trial court's ruling would constitute harmless error "given the doctrine of *res judicata* and Sky Ranch's obligation to assert all compulsory counterclaims . . . ."[26] The Association's responses misconstrue both the nature of the trial court's ruling and the principles of *res judicata*.

As Sky Ranch pointed out in its opening brief, the issue of the sufficiency of the funds held in escrow was never raised in the pleadings and was not tried by the implied consent of the parties. The Association makes no attempt to argue that the issue was tried

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26. The Association also raises the point that "this issue was not raised in Sky Ranch's docketing statement." As the Utah Supreme Court has pointed out, failure to raise an issue in a docketing statement does not affect an appellant's right to raise the issue in its opening brief. *Nelson ex rel. Stuckman v. Salt Lake City*, 919 P.2d 568, 572 (Utah 1996). Thus, the Association's failure to develop this point is understandable.

by implied consent, but makes a half-hearted attempt to argue that because Sky Ranch had appended the March 31, 2003 Notice of Termination as an exhibit to its counterclaim, and because the exhibit stated that "the lease fee specified in section 3 has frequently been overdue over the years, and is currently past due," (Ex.2, as referenced in R. at 489/5), the issue of the sufficiency of the escrow funds was therefore presented for the trial court's decision. First, this argument overlooks the purpose for which the exhibit was introduced by the counterclaim. The counterclaim incorporated the exhibit for the purpose of showing that it had been sent, not to make allegations as to the reasons for terminating the lease. (R. at 489/5.) Further, the exhibit was a notice to cure—only those items listed that were not cured within 30 days after the notice would be reasons for termination. That exhibit could not provide allegations to support the termination of the lease, as it was created 30 days before any termination took place. But most importantly, even if this sentence in the exhibit had brought up the issue of whether the Association was past due on its lease payments as of March 31, 2003, that does not raise the issue of whether the lease payments paid into the trial court constitute full payment for the period between May of 2003 and December of 2010.

Next, the Association argues that, even if the issue was not pleaded, the trial court's ruling constitutes harmless error. Sky Ranch, it argues, had an obligation to raise the issue under Rule 13 of the Utah Rules of Civil Procedure, and the failure to do so barred it from adjudicating the issue later. This argument fails for the same reason: the adequacy of lease payments prior to the date of termination of the lease is not the same

issue as the adequacy of payments for the lease deposited after the date of termination of the lease.

Rule 13(a) of the Utah Rules of Civil Procedure requires that a counterclaim be brought "if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim . . . ." The subject matter before the trial court was whether Sky Ranch had the right to terminate the Airport Lease as of May of 2003. Therefore, it would be proper for Sky Ranch to present all of its claims relating to that question, including whether the Association had not tendered full payment to Sky Ranch up until that date. However, the question of whether the funds held in escrow constituted full lease payments from May of 2003 to December of 2010 is not within the subject matter of the Association's complaint. Further, it would be an after-acquired counterclaim, which Utah R. Civ. P. 13(d) makes clear is permissive rather than compulsory. Because any claim for an accounting of the rent due on the Airport Lease after the date of termination would not have been ripe until the issue of whether the termination was valid was settled, Sky Ranch could not have brought the claim that the Association now claims was barred. Because the issue of whether the funds held in escrow were adequate to fully pay the rent under the Airport Lease was not properly before the trial court, this Court should reverse the trial court's judgment and instruct the trial court to determine the proper distribution of the deposit held in court. *See* 23 Am. Jur. 2d *Deposits in Court* §§ 15 & 17 (2011) (describing the proper procedure for distributing deposits held in court).

CONCLUSION

For the foregoing reasons, Sky Ranch respectfully asks this Court to reverse the trial court's decision and remand with instructions as requested.

RESPECTFULLY SUBMITTED this 22nd day of December, 2011.

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PROOF OF SERVICE

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